Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

(5)

No. 96-1987

# In the Supreme Court of the United States

OCTOBER TERM, 1997

NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Acting Solicitor General*
JOEL I. KLEIN
*Assistant Attorney General*
JOHN J. POWERS, III
MARK S. POPOFSKY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

18 pp

## QUESTION PRESENTED

Whether the court of appeals correctly held that this Court's construction in *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764 (1993), of the jurisdictional reach of Section 1 of the Sherman Act, 15 U.S.C. 1, controls in a criminal case charging a violation of that statute.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 14 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) | 7, 8 |
| *EEOC* v. *Aramco*, 499 U.S. 244 (1990) | 9 |
| *Ford* v. *United States*, 273 U.S. 593 (1927) | 13 |
| *Gorin* v. *United States*, 312 U.S. 19 (1941) | 11 |
| *Hartford Fire Ins. Co.*. v. *California*, 509 U.S. 764 (1993) | 3, 5, 9, 12 |
| *Morissette* v. *United States*, 342 U.S. 246 (1952) | 8 |
| *Nash* v. *United States*, 229 U.S. 373 (1913) | 9, 11 |
| *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) | 6 |
| *Staples* v. *United States*, 114 S. Ct. 1793 (1993) | 8 |
| *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952) | 7 |
| *Strassheim* v. *Daily*, 221 U.S. 280 (1911) | 7, 8, 10 |
| *United States* v. *Aluminum Co. of American*, 148 F.2d 416 (2d Cir. 1945) | 5, 12 |
| *United States* v. *Bowman*, 260 U.S. 94 (1922) | 10 |
| *United States* v. *Container Corp.*, 393 U.S. 333 (1969) | 13 |
| *United States* v. *Pacific & Arctic Ry.*, 228 U.S. 87 (1913) | 13 |
| *United States* v. *South-Eastern Underwirters Ass'n*, 322 U.S. 533 (1944) | 11 |
| *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) | 6 |
| *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) | 7, 8, 9, 11, 12, 13 |

Cases—Continued: Page

*Youakim* v. *Miller*, 425 U.S. 231 (1976) ..... 12

Constitution and statutes:

U.S. Const. Amend V (Due Process Clause) ..... 12
Sherman Act, § 1, 15 U.S.C. 1 *et seq.* ..... 2, 4, 5, 6, 8, 9, 12
15 U.S.C. 6a ..... 3
26 U.S.C. 5849 ..... 6
31 U.S.C. 5322(a) ..... 6

Miscellaneous:

H.R. Rep. No. 686, 97th Cong., 2d Sess. (1982) ..... 3
1 Charles C. Hyde, *International Law* (2d ed. 1945) .. 10
2 John B. Moore, *A Digest of International Law* (1906) ..... 10
Restatement (Third) of Foreign Relations Law (1987) ..... 9
U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (Apr. 1995) ..... 12
U.S. Department of State, *Report on Extraterritorial Crime and The Cutting Case* (1887) ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1987

NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 109 F.3d 1. The opinion and order of the district court (Pet. App. 30a-49a) are reported at 944 F. Supp. 55.

### JURISDICTION

The judgment of the court of appeals was entered on March 17, 1997. The petition for a writ of certiorari was filed on June 13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

On December 13, 1995, a grand jury sitting in the District of Massachusetts returned a two-count in-

dictment charging that petitioner conspired with others to increase the price of thermal facsimile (fax) paper sold to customers in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court granted petitioner's motion to dismiss the indictment on the ground that it failed to allege a violation of the Sherman Act. The court of appeals reversed. Pet. App. 1a-24a.

1. The indictment charges that during meetings held in Japan in early 1990, petitioner and other fax paper manufacturers "agreed to increase prices for fax paper to be sold in North America." Pet. App. 52a. To effectuate the conspiracy, the manufacturers sold the fax paper in Japan to co-conspirator unaffiliated trading houses that operated both in Japan and in the United States and arranged for shipment and sale to ultimate customers located in the United States. *Id.* at 52a-53a. The manufacturers, including petitioner, "sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to the customers at specified prices," "directed their co-conspirator trading houses to implement price increases to fax paper customers in North America," and "monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged." *Ibid.* The indictment also alleges that in 1990 petitioner "sold approximately $6.1 million dollars of fax paper for import into North America," and that petitioner's conduct "had a direct, substantial and reasonably foreseeable effect on import and domestic commerce." *Id.* at 51a, 54a.

2. On September 3, 1996, the district court granted petitioner's motion to dismiss the indictment. Pet.

App. 30a-49a. The district court concluded that the indictment lacked allegations of conspiratorial conduct within the United States. *Id.* at 42a-45a. The court also held that a criminal charge under the Sherman Act may not be based on conduct occurring wholly outside the United States. *Id.* at 45a-49a. It rejected the government's reliance on *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764, 796 (1993), in which the Court deemed it "well established * * * that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," because *Hartford* involved a civil, not criminal, antitrust action. Pet. App. 46a.

3. The court of appeals reversed. Pet. App. 1a-29a. It declined to address whether the indictment alleges conspiratorial conduct within the United States. *Id.* at 5a n.2. Rather, the court held that this Court's decision in *Hartford* governs the jurisdictional reach of the Sherman Act in a criminal case. *Id.* at 19a.[1]

The court observed that "in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statute." Pet. App. 9a. That language provides that "[e]very contract, combination

---

[1] The court of appeals also did not address (Pet. App. 8a) the government's alternative contention that the Sherman Act applies to wholly foreign conduct by virtue of a 1982 amendment to the Act. See 15 U.S.C. 6a (applying the Act to foreign conduct, including wholly extraterritorial conduct, as long as the conduct "has a direct, substantial, and reasonably foreseeable effect" on United States domestic or import commerce); see also H.R. Rep. No. 686, 97th Cong., 2d Sess. 10 (1982) ("wholly foreign transactions * * * are covered by" Section 6a); *Hartford*, 509 U.S. at 796-797 n.23.

in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * with foreign nations, is declared to be illegal." 15 U.S.C. 1. The court therefore reasoned that "common sense" and "fundamental interpretive principle[s]" (Pet. App. 9a) support construing Section 1 the same way, whether the underlying litigation is civil or criminal. *Id.* at 9a-11a. The court also explained that "[t]he words of Section One have not changed since the *Hartford Fire* Court found that they clearly evince Congress' intent to apply the Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding." *Id.* at 12a.[2] Accordingly, the court reversed the order of the district court and reinstated the indictment. *Id.* at 19a.

## ARGUMENT

Petitioner challenges the court of appeals' holding that "the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States," regardless of whether it is applied in a civil or criminal case. Pet. App. 19a. The court of appeals' holding represents the first decision of an appellate court to address that issue.

---

[2] The court also rejected petitioner's reliance on international comity on the grounds that a stronger comity argument had been rejected in *Hartford* and that price-fixing is illegal in both Japan and the United States. Pet. App. 17a-18a. In a concurring opinion, Judge Lynch also expressed the view that the indictment comported with international comity principles. *Id.* at 19a-29a. Although petitioner alludes to "explosive implications of the First Circuit decision for relations with foreign states," Pet. 5, 12, petitioner does not challenge the court of appeals' comity holding in this Court.

1. Section 1 of the Sherman Act prohibits conspiracies in unreasonable restraint of "trade or commerce * * * with foreign nations." 15 U.S.C. 1. In *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764, 796 (1993), this Court held that this statutory language embraces "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[3] In reaching that conclusion, the Court in *Hartford*, 509 U.S. at 796-797 & nn. 22, 24, cited with approval Judge Hand's decision in *United States* v. *Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945), which held that foreign corporations are liable for conspiratorial conduct undertaken wholly abroad that had substantial and intended effects within the United States. *Id.* at 443-444.[4]

Contrary to petitioner's contention (Pet. 16-19), the fact that *Hartford* arose in a civil proceeding does not detract from the conclusion that the jurisdictional reach of the Sherman Act is the same in civil and

---

[3] Petitioner argues (Pet. 20-21) that *Hartford* did not involve wholly foreign conduct and, in any event, that the parties there conceded jurisdiction. As the court below correctly recognized (Pet. App. 8a, n.3), however, several of the claims in *Hartford* alleged conspiracies involving conduct solely by foreign companies that occurred outside of the United States. *Hartford*, 509 U.S. at 776, 795. Moreover, at least one foreign defendant contested jurisdiction. Pet. App. 8a n.3 (citing 509 U.S. at 795 n.21).

[4] The indictment in this case easily meets the jurisdictional test under *Hartford* and *Alcoa*. The indictment charges that petitioner conspired in Japan with the specific purpose of raising prices within the United States, Pet. App. 50a-54a, and that the conspiracy "had a direct, substantial and reasonably foreseeable effect on import and domestic commerce," *id.* at 54a.

criminal cases. Section 1 defines the jurisdictional reach of the Act for both civil and criminal offenses. 15 U.S.C. 1. The court below therefore properly "interpret[ed] the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil." Pet. App. 9a.

The court's conclusion is fully supported by this Court's precedents. In *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), this Court reaffirmed the principle that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." In construing the meaning of the word "willfully" in 31 U.S.C. 5322(a) (1988), the Court in *Ratzlaf* found "even stronger cause to construe a *single* [statutory term] the same way each time it is called into play." 510 U.S. at 143. Similarly, in *United States* v. *Thompson/Center Arms Company*, 504 U.S. 505 (1992), a plurality of the Court applied the rule of lenity when construing a statute with criminal applications, 26 U.S.C. 5849, in a civil proceeding. The plurality rejected the dissent's contention that particular statutory language could have different meanings depending on whether the court construed that language in a civil or criminal case. *Id.* at 518-519 n.10 (plurality opinion).[5] Thus, both *Ratzlaf* and *Thompson/Center* support the court of appeals' holding that *Hartford*'s construction of Section 1 of the Sherman Act controls in a criminal case.

---

[5] In *Thompson/Center*, Justices Scalia and Thomas joined the plurality's application of the rule of lenity in a civil case to a statute with criminal application. 504 U.S. at 519 (Scalia, J., concurring in the judgment).

Indeed, petitioner's construction of the Sherman Act would produce results that Congress could not have intended. If petitioner's interpretation of the Sherman Act were correct, petitioner would be subject here to a civil suit seeking treble damages for injuries suffered by the government or a third party, but would be immune from criminal prosecution based on the same statutory violation. Moreover, under petitioner's reading of the Act, the government may not prosecute conspirators operating abroad who intend to, and succeed in, fixing prices within the United States, unless a co-conspirator undertook an overt act within the United States. Those distinctions find no support in the Sherman Act's text or purpose to protect against anticompetitive behavior.

2. There is also no merit to petitioner's argument (Reply Br. 9-10) that the decision below conflicts with *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), and *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). Although *American Banana* held that the Sherman Act did not reach the foreign conduct alleged in that case, 213 U.S. at 356-357, *American Banana* did not involve conduct alleged to cause substantial and intended effects in the United States. As this Court observed in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 288 (1952), "the holding in [*American Banana*] was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive." Indeed, in *Strassheim* v. *Daily*, 221 U.S. 280 (1911), Justice Holmes, who also wrote the Court's opinion in *American Banana*,

cited *American Banana* for the proposition that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect." 221 U.S. at 285. In any event, to the extent petitioner reads (reply Br. 9) *American Banana*, a civil case, to hold that the Sherman Act does not apply to wholly foreign conduct with effects in the United States, that reading is flatly refuted by this Court's decision in *Hartford*. See Pet. App. 7a.[6]

The decision below is also in accord with this Court's decision in *Gypsum*. Contrary to petitioner's contention (Reply Br. 10), *Gypsum* neither applied nor established an "age-old tradition of interpreting the Sherman Act differently in civil and criminal cases." Rather, the Court in *Gypsum* construed Section 1 of the Act when applied in criminal cases to contain an element of *mens rea*, notwithstanding Congress's silence on the issue. 438 U.S. at 437; see also *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (discussing *Gypsum*). That settled maxim of interpretation, see *Morissette* v. *United States*, 342 U.S. 246, 263 (1952), however, does not support construing the Act's *express* jurisdictional reach differently in civil and criminal actions. See Pet. App. 15a ("[t]here is simply no comparable tradition or rationale for

---

[6] To the extent *American Banana is* relevant, it supports the conclusion that the territorial reach of the Sherman Act is the same in both civil and criminal cases. See 213 U.S. at 357 (explaining that the Act's territorial reach is the same in civil and criminal cases because "the law begins by making criminal the acts for which it gives the right to sue").

drawing a criminal/civil distinction with regard to extraterritoriality").[7]

3. Petitioner and the government of Japan also contend (Pet. 14-19, Amicus Brief 9) that the court of appeals' decision conflicts with the principle that criminal statutes should be narrowly construed and the presumption against the extraterritorial application of statutes, see *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 250 (1991). Those contentions, however, presuppose an ambiguity that does not exist. This Court declared in *Hartford*—notwithstanding the general presumption against extraterritoriality in the face of statutory ambiguity—that Section 1 reaches foreign conduct that causes substantial and intended effects within the United States. Thus, the court below (Pet. App. 17a) correctly concluded that *Hartford* "foreclosed [it] from trying to tease an ambiguity out of Section One relative to its extraterritorial application."

Petitioner and the government of Japan similarly rely (Pet. 15-17; Amicus Br. 6-11) on comment f to Section 403 of the Restatement (Third) of Foreign Relations Law (1987), which states that extraterritorial application of the antitrust laws "should be found only on the basis of express statement or clear implication." The court of appeals correctly recognized (Pet. App. 16a), however, that the Restatement's comment merely restates the usual presumption

---

[7] Indeed, the Court in *Gypsum* employed the background rule of requiring a *mens rea* in criminal cases precisely because the Court recognized that Section 1 otherwise has a single meaning applicable in both civil and criminal cases. See *Gypsum*, 438 U.S. at 438-439 (observing that under *Nash* v. *United States*, 229 U.S. 373 (1913), the rule of reason under Section 1 governs in criminal actions).

against extraterritoriality and does not dictate any rule of international law that compels a different interpretation of jurisdictional language depending on whether a court is interpreting that language in a civil or criminal case.[8]

Moreover, contrary to the government of Japan's assertion (Amicus Br. 4-5), the First Circuit's decision fully comports with principles of international law. It is well settled that a government may impose civil or criminal sanctions for foreign conduct that is intended to cause and actually causes substantial effects within its territory. 1 Charles C. Hyde, *International Law* § 238, at 798 (2d ed. 1945). That principle was firmly established at the time of the Sherman Act's adoption. See U.S. Department of State, *Report on Extraterritorial Crime and The Cutting Case* 23-24 (1887); accord 2 John B. Moore, *A Digest of International Law* § 202, at 244 (1906) ("The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable in the place where the evil is done, is recognized in the criminal jurisprudence of all countries."). Moreover, that principle long has been accepted by this Court, see *e.g.*, *Strassheim*, 221 U.S. at 285 (Holmes, J.), and is embedded in the "substantial and intended effects" test of *Alcoa* and *Hartford*. Accordingly, international law does not support petitioner's contention that the Sherman Act's

---

[8] Japan's reliance (Amicus Br. 9) on *United States* v. *Bowman*, 260 U.S. 94 (1922), is similarly misplaced. As the court of appeals observed (Pet. App. 14a), *Bowman* "merely restate[s] the presumption against extraterritoriality previously established in civil cases like *American Banana* * * * [and] nowhere suggest[s] that a different, more resilient presumption arises in criminal cases."

jurisdictional reach should differ in criminal and civil cases. See also Pet. App. 23a-28a (Lynch, J., concurring).

4. Petitioner also errs in suggesting (Pet. 13, 24-30) that by applying *Hartford* in a criminal case, the decision below will impair the flexible application of the Sherman Act in civil cases.

Petitioner's contention is based on the assumption (Pet. 24) that courts will narrowly construe the Sherman Act's standard of conduct in civil cases to avoid creating an ambiguous standard that might later apply in criminal cases. That concern is unfounded. This Court already has rejected the contention that the Sherman Act imposes an ambiguous standard of conduct in criminal cases. See *Nash* v. *United States*, 229 U.S. 373, 376-378 (1913) (rejecting the contention that application of rule of reason in criminal cases is void for vagueness); *Gorin* v. *United States*, 312 U.S. 19, 27 n.13 (1941) (describing Section One as an "[a]dequately definite criminal statute[]"); *Gypsum*, 438 U.S. at 438-439 & 446-447 n.22 (approving the criminal prosecution of certain information exchanges held covered by Section One in prior civil cases); see also *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 557-558 (1944) (refusing to "freeze the proscription of the Sherman Act within the mold of [pre-1890] judicial decisions defining the commerce power" and explaining, "[t]hat Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt").[9]

---

[9] In any event, the government generally restricts its criminal enforcement of the Sherman Act to *per se* violations of the

5. Petitioner additionally argues (Pet. 19-23) that the First Circuit's decision infringes on rights protected by the Due Process Clause of the Fifth Amendment because petitioner lacked reasonable notice that the Sherman Act criminalizes foreign conduct. That argument, however, was not raised or decided below and, consequently, is not properly before this Court. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). In any event, petitioner's contention is without merit. This Court did not hesitate in *Hartford* to declare it "well established" that Section 1 of the Sherman Act reaches such conduct. 509 U.S. at 796 (citing *inter alia*, *Alcoa*, 148 F.2d at 444). Although petitioner argues (Pet. 19-20) that it "had no reason to believe" that *Alcoa*'s construction of Section 1 might govern in a criminal case, petitioner can point to no principle of statutory construction that permits the language of Section 1 to yield a narrower jurisdictional reach in a criminal than in a civil case. *Alcoa* thus provided petitioner ample notice that a court, when confronted with the issue, would hold that Section 1 criminalizes foreign conduct with substantial and intended effects in the United States.[10]

---

Act. See U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* 2 (Apr. 1995).

[10] Petitioner is thus in the same position as respondents in *Gypsum*, who argued that "principles of fair notice embodied in the Due Process Clause" precluded the government's criminal prosecution under the Sherman Act of "a mere exchange of information which had a stabilizing effect on prices * * * regardless of the purposes for the exchange," because no case had previously so recognized. *Gypsum*, 438 U.S. at 446-447 n.22. This Court, however, rejected that "lack of notice," because the same type of conduct had been held to be illegal in a

6. Finally, contrary to petitioner's suggestion (Reply Br. 4-8), review at this time will not necessarily obviate a trial on the merits. The district court, in a holding that the court of appeals declined to address (Pet. App. 5a, n.2), construed the indictment in this case not to allege conspiratorial conduct in the United States. *Id.* at 42a-45a. The district court's conclusion, however, is inconsistent with the plain language of the indictment, which charges that the trading houses, which were "co-conspirator[s]" in petitioner's horizontal price-fixing scheme, brought the fax paper into the United States from Japan for sale. *Id.* at 52a. The indictment similarly alleges numerous acts taken by the co-conspirator trading houses in this country to further their scheme. *Id.* at 52a-54a.

Because the allegations in the indictment clearly allege co-conspirator conduct in the United States, the district court has jurisdiction in this case on that ground. See *United States* v. *Pacific & Arctic Ry.*, 228 U.S. 87, 106 (1913); *Ford* v. *United States*, 273 U.S. 593, 619-624 (1927). Thus, further proceedings in the district court are likely to be required regardless whether the decision below was correctly decided. Accordingly, there is no reason to review the decision of the court of appeals at this time. Should petitioner ultimately be convicted, it can present its current claim, along with any other claims it may have, to this Court in a petition for a writ of certiorari seeking review of the final judgment against it.

---

civil case. *Gypsum*, 438 U.S. at 447 n.22 (citing *United States* v. *Container Corp.*, 393 U.S. 333 (1969)).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Acting Solicitor General*
JOEL I. KLEIN
*Assistant Attorney General*
JOHN J. POWERS, III
MARK S. POPOFSKY
*Attorneys*

OCTOBER 1997